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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, ~~1956~~ 1955

No. 776

ROSCOE WAGNER, d/b/a WAGNER TRANSPORTATION COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

ELI A. WESTON,
Boise, Idaho,
Attorney for Petitioner.

WILLIS C. MOFFATT,
Boise, Idaho,
Of Counsel.

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IN THE

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vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Roscoe Wagner, d/b/a Wagner Transportation Company, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on the 30th day of December, 1955.

OPINIONS BELOW

The Order of the National Labor Relations Board (R 35) is reported in 110 NLRB, No. 192, Case No. 19-CA-977 and the Opinion of the Court of Appeals (R 116) is reported in 227 F. 2d 200.

QUESTION PRESENTED

The one question in this case is whether or not Section 10(c) of the National Labor Relations Act protects the employer in his right to discharge an employee when the employee, at the time of the discharge, by his expressions, outbursts and attitude proves that he is not a fit or qualified employee and where the undisputed facts show both a friendly and an unfriendly attitude on the part of the employer towards unionization.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act as amended (61 Stat. 136, 29 U. S. C., Supp. V, Secs. 151, et seq.) are set forth in the appendix at page 11.

STATEMENT OF THE CASE

The undisputed facts in this case show that when the Petitioner discovered that some of his employees had signed authorization cards or had joined the Teamsters' Union, the Petitioner immediately sought out

the union representative and in a friendly and cooperative attitude discussed the prospects of unionization and adjustment of grievances (R 53).

The undisputed testimony further shows that the preliminary meeting was non-productive but that the Petitioner did consent to an election although he objected to certain provisions that were to be incorporated in the proposed contract (R 56).

The record further shows that the Petitioner, in discussing union matters and other matters with employee Weyer, Weyer became incensed and during the ensuing conversation and altercation called the Petitioner "a damned liar" and that because of this outburst and because of the attitude and characteristic shown by the employee during the altercation, the Petitioner asked the employee for his resignation (R 69). The record also shows that *at the time of the altercation* the Petitioner discovered that the employee had deliberately lied with reference to his knowledge of union activities (R 67).

> Q. So that when Mr. Wagner asked you how you were coming with this union business, you stated that you didn't know anything about it, is that right?
>
> A. Yes.
>
> Q. But you did know about, didn't you?
>
> A. Yes.

Under this statement of the case, the question arises as to whether or not an employer has a right to dis-

charge an employee if he discovers the employee has characteristics not known before which disqualify the employee for further employment.

REASONS FOR GRANTING THE WRIT

We believe that the cases hereinafter referred to and the statement of policy by the General Counsel's Office under the Labor-Management Relations Act present a serious question, as far as we know not hereinbefore decided, to-wit: Does the employer have the right to discharge an employee whenever the employer discovers the danger of maintaining the employee in the employer's organization? Does the employer have this right under Section 10(c) of the Act even though there be evidence in the case showing the employer's animosity to the union? Is the right to continuous employment guaranteed under the Labor-Management Relations Act.

We feel this case involves a question which is of general and vital importance in the administration of the National Labor Relations Act as amended.

We believe that the decisions heretofore rendered on this question do not definitely decide the issue or represent a fundamental conception as to the nature, purpose or scope of the National Labor Relations Act and that if these decisions are projected into future rulings the same will result in a basic distortion and misinterpretation of the National Labor Relations Act.

Under Administrative Decision, Case No. K-14, dated July 5, 1955, the General Counsel upheld the Regional Director's refusal to issue a complaint in a case where it appeared that an employee, in a heated argument over the telephone with the superintendent, displayed a temperamental outburst which, in the opinion of the General Counsel justified the employee's discharge.

In the case of National Labor Relations Board vs. American Thread Co., 210 F 2d 381, the Fifth Circuit decided on a Petition for Enforcement that Section 10(c) of the Act, which provides that "no order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged * * * for cause * * *" precluded the employer from reinstating an employee who had been discharged for insubordination and disobedience of orders.

In the case of National Labor Relations Board vs. Clearwater Finishing Company, 216 F 2d 608, the Fourth Circuit held that the employer was justified in discharging the employee as a result of an altercation with another employee even though the altercation concerned union activities where it appeared that the real reason for the discharge was the attitude shown by the employee *during the altercation.*

In the case of National Labor Relations Board vs. Polynesian Arts, Inc., 209 F 2d 846, the Sixth Circuit ruled that the employer was justified in discharging an employee for insubordination where it appeared

that the employee had made herself unqualified for further employment.

In the case of Hoover vs. National Labor Relations Board, 191 F 2d 380, the Sixth Circuit Court ruled that an employer is not required to retain in his employ and continue to pay persons who are engaged in a wrongful attempt to destroy his business. This same ruling by the Fourth Circuit in the case of National Labor Relations Board vs. Clearwater Finishing Co., 216, F 2d 608.

On the question of the burden of proof which we feel has not been met in this case, the Eighth Circuit ruled in the case of Local No. 3, United Packinghouse Workers, vs. National Labor Relations Board, 210 F 2d 325, that the burden rests upon the Board and is at no time shifted to the employer; that where the employer shows causes other than union membership or activities, this defense must be overcome by proof from the Board sufficient to outweigh the employer's defensive evidence. And in the following cases:

NLRB vs. MacSmith Garment Co., 203 F. 2d 868, 5th Cir.;

NLRB vs. National Die Casting Co., 207 F. 2d 344, 7th Cir.;

NLRB vs. Reynolds International Pen Co., 162 F. 2d 680, 7th Cir.

the courts held that the employer is not required to exonerate himself of unfair labor practices as the

burden rests with the Board. The Board must prove the charges affirmatively by substantial evidence.

The Congressional Committee Reports on the 1947 amendments referring particularly to Section 10(c) and the duty of the court to investigate the evidence before the Board reads as follows:

> "While the Administrative Procedure Act is generally regarded as having intended to require the courts to examine decisions of administrative agencies far more critically than has been their practice in the past, by reason of a conflict of opinion as to whether it actually does so, a conflict that the courts have not resolved, there was included both in the House bill and the Senate amendment, language making it clear that the act gives to the courts a real power of review."

The question presented in this case is clearly pointed out by this hypothetical case:

If it be assumed there is evidence in a case showing the employer guilty of an unfair labor practice, would the employer be required to his detriment and financial loss to retain on his payroll an employee found guilty of the following:

1. Theft or embezzlement?
2. Insubordination?
3. A demeanor or character entirely inconsistent with his employment requirements?
4. Defiance to the employer?

The important consideration in this case is whether or not there is any evidence to support a finding that the employer was not justified in discharging the employee in question at the time of the altercation, *being the time when the employer first discovered the true character and insubordinate attitude of the employee.*

All of the cases on this point are determined by the question "What motivated the discharge?" Was the motivation the antipathy of the employer to the union? Or was the attitude as then expressed by the employee the real reason and motivation for the discharge? In this case there is no evidence that the motivation for the discharge of this employee was the attitude of the employer towards the union, but on the contrary the actual and instant reason for the discharge arose at the time of the altercation and not before and was based on the fact that the employee, during the altercation, displayed his disqualification as an employee by calling the employer a "damned liar." (NLRB vs. American Thread Co., 210 F 2d 381.)

We believe the facts in this case bring squarely before the Court the true meaning and intent of Section 10(c) of the National Labor Relations Act which contains, among other things, the following:

> "* * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged * * * for cause * * *." 29 USC Sup V No. 160 (c).

If the above quotation means what it says, the Court should consider this Petition and determine whether or not an employer is required to maintain on his payroll an employee whose insubordinate attitude, characteristic and demeanor proves him to be an improper and dangerous person to be trusted with the company's property and equipment.

We respectfully submit that Section 10(c) does not require the employer to retain such employee on his payroll if the employer discovers any of the above characteristics.

Respectfully submitted,

ELI A. WESTON,
Boise, Idaho
Attorney for Petitioner.

WILLIS C. MOFFATT,
Boise, Idaho,
Of Counsel.

Dated: March, 1956.

APPENDIX A

United States Court of Appeals
For The Ninth Circuit

No. 14,721

Nov. 17, 1955

NATIONAL LABOR RELATIONS BOARD,

Appellant,

vs.

ROSCOE WAGNER, doing business as Wagner Transportation Company,

Appellee.

Petition for Enforcement of an Order of the National Labor Relations Board

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Before: HEALY and CHAMBERS, Circuit Judges. HARRISON, District Judge

PER CURIAM

This case is before us on petition of the Board to enforce its order entered against respondent. The Board, following the report of its examiner, found that respondent violated §8(a)(3) of the National Labor Relations Act by discharging an employee named Weyer because of his membership in the Teamsters' Union, and violated §8(a)(1) by this and other conduct. The usual cease and desist order was entered,

together with an order to make Weyer whole for loss of pay and to post appropriate notices.

The sole argument here has to do with the sufficiency of the evidence in support of the unfair practice charges. While the evidence was conflicting, there was abundant testimony, not inherently incredible, to support the Board's findings on the point. Questions of credibility in such circumstances are for the examiner and the Board, not for us, to resolve.

A decree enforcing the order will be entered.

(Endorsed:) Per Curiam Opinion. Filed Nov. 17, 1955. Paul P. O'Brien, Clerk.

APPENDIX B

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C., Secs 151, et seq.) are as follows:

Sec. 10(c) * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1955

ROSCOE WAGNER, D/B/A WAGNER TRANSPORTATION COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the court below (Pet. pp. 10–11) is reported at 227 F. 2d 200. The Board's decision and order (R. 13–43)[1] is reported at 110 N. L. R. B. 1179.

JURISDICTION

The judgment of the court below was entered on December 30, 1955. The petition for a writ of certiorari was filed on March 20, 1956. The

[1] References to portions of the printed record are designated "R." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) are set forth in the Appendix *infra*, pp. 8–10.

QUESTION PRESENTED

Whether substantial evidence on the record considered as a whole supports the Board's finding, affirmed by the court below, that petitioner discharged an employee because of his union membership, in violation of Section 8 (a) (3) and (1) of the Act.

STATEMENT

A. The Board's Decision and Order

1. *The unfair labor practices.*—Early in 1954, petitioner's employees began to sign cards designating the Union[2] as their representative for collective bargaining purposes (R. 16, 21; 77–78). On various occasions during the first two months of that year, petitioner Roscoe Wagner, who manages the business, and his brother Roger Wagner, who acts as assistant manager, told the employees that if the Union's organizational campaign were successful, petitioner would sell all or part of his business (R. 20, 21, 22, 25–26, 36, 38; 63, 71, 78–

[2] General Teamsters, Warehousemen and Helpers Union, Local No. 483.

80, 88, 89, see pp. 4–5, *infra*); told one of the employees that certain fellow employees had been discharged for union activity (R. 18, 25, 37, 38; 62, see p. 4, *infra*); led the employees to believe that their union activities were under surveillance (R. 18, 20, 26, 36, 37; 61, 71, 89, 96, see p. 4, *infra*); and, in the context of such conduct, interrogated the employees regarding their union activity (R. 17–18, 20, 22, 26, 36–37; 61, 71, 79, 85, 88, see pp. 3–4, *infra*).[2]

Cecil Weyer, a truck driver in petitioner's employ, had been a member of the Union for about 15 years prior to his discharge (R. 17; 66). Early in February 1954, he signed a new union authorization card (R. 17; 60). According to Weyer's testimony, which was credited by the Trial Examiner and the Board, on February 16, 1954, the following events occurred: Roger Wagner interrupted a conversation among three of the drivers, including Weyer, by asking them, "How are you and the Union doing? * * * I hear you fellows are organized" (R. 17–18; 36; 61). Weyer replied that he knew nothing of it and, when Roger Wagner asked if he had not signed a union application blank, answered that it was unnecessary for him to do so as he had been a member for 15

[2] On the basis of the findings summarized above, the Board found that petitioner violated Section 8 (a) (1) of the Act by engaging in the conduct described. The court below affirmed this finding and petitioner does not challenge the propriety of the decision below in this respect.

years (R. 18, 23, 37; 61). At this point, Roscoe Wagner, who had overheard the exchange, called Weyer a "liar," pulled a piece of paper out of his pocket, held it up, and said, "I can tell you right where you signed this application and the day and everything, all about it" (*id.*). He then approached Weyer with doubled fist and threatened to "beat [Weyer's] head off" (*id.*). Weyer attempted to mollify Wagner, but Wagner announced, "I don't want to talk to a Communist. * * * I don't want no union man around here. They are just nothing but a bunch of Communists" (R. 18, 23, 37; 61–62). Roscoe Wagner then told Weyer that he, Weyer, was "going to resign" (R. 18, 23, 37; 62). When Weyer asserted that he would not do so, Roscoe Wagner instructed Roger Wagner to "fix up [Weyer's] resignation papers" (*id.*).

Roger Wagner then prepared, and Roscoe Wagner (but not Weyer) signed, a statement that Weyer had "left of his own free will" and that "his services as a truck driver have been satisfactory" (R. 18, 24, 37; 13, 62–63). Roger gave the statement to Weyer, saying, "I hate to see this, you have been one of our best drivers. You know how Roscoe feels about the union. You know what happened to Dick Gear and Bob Sauers and some more of them" (R. 18, 25, 38; 62). Roger added that "he wouldn't have a union man working for him and * * * he would sell every truck in the fleet if he had to" (R. 25;

63.) As his conversation with Roscoe had been unpleasant and contained the suggestion of bodily harm, Weyer took the letter and left (R. 18, 24, 37; 62, 64).

About April 30, 1954, petitioner offered to reemploy Weyer, but Weyer refused the offer (R. 19; 65–66).

Before the Board, petitioner asserted that Weyer was discharged because he had called petitioner Wagner a liar when the latter admonished him for allegedly having spent an inordinately long time at a stopover in Nevada and for the further reason that Weyer had given an equivocal answer when Wagner inquired about his union membership (R. 37–38). The trial examiner and the Board discredited petitioner's assertion that Weyer called him a liar (R. 38). The Board also concluded that petitioner's real reason for discharging Weyer was not the latter's equivocation with respect to his union membership, but rather the fact that Weyer had actually joined the Union and was an active member, and that Wagner seized upon his heated argument with Weyer as an excuse to rid himself of a union adherent (R. 38). Accordingly, the Board found that petitioner in discharging Weyer violated Section 8 (a) (3) and (1) of the Act.

2. *The Board's order.*—The Board's order (R. 39–41, 30–31) requires petitioner to cease and desist from the unfair labor practices found, or from in any other manner interfering with, re-

straining, or coercing his employees in the exercise of their statutory rights. Affirmatively, petitioner is required to make employee Weyer whole for any loss of pay he may have suffered by reason of the discrimination against him, and to post appropriate notices.

B. The Opinion of the Court of Appeals

The court below enforced the Board's order in full. The court stated, in its *per curiam* opinion (Pet. p. 11):

> The sole argument here has to do with the sufficiency of the evidence in support of the unfair practice charges. While the evidence was conflicting, there was abundant testimony, not inherently incredible, to support the Board's findings on this point. Questions of credibility in such circumstances are for the examiner and the Board, not for us, to resolve.

ARGUMENT

Essentially, petitioner's case here, as in the court below, is that (Pet. 4–7, 8–9) the record as a whole does not support the Board's finding that Weyer was discharged because he had joined the Union and was an active member, rather than for the reasons assigned by petitioner. Petitioner's challenge to the substantiality of the supporting evidence presents no question warranting review by this Court. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502–

503. Moreover, as the Statement shows and as the court below found, the Board's findings are adequately supported by the record as a whole.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,

DAVID P. FINDLING,
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NANCY M. SHERMAN,
Attorney,
National Labor Relations Board.

APRIL 1956.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

Prevention of Unfair Labor Practices

Sec. 10. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be

of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall

be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1955